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IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1975

No. 74-1406

WILLIAM ALRED, - - - - - Petitioner,

versus

UNITED STATES OF AMERICA, - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1975

No. _____

WILLIAM ALRED, - - - - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on April 8, 1975.

OPINIONS BELOW

The opinion of the jury verdict is unreported and set forth in the Appendix, p. 2a, herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 8, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Did a purposeful delay of some fifteen months between identification of the accused and his subsequent arrest prejudice defendant's ability to defend himself thereby violating the due process clause of the Fifth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States:

> "V
>
> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT

Petitioner was indicted for conspiracy to willfully receive, conceal, transport, and dispose explosive materials, knowing that such explosive materials were stolen, or in violation of Title 18, §842(h), U.S.C. Also,

included in the appeal is Count two, wherein the defendant, William Edward Alred, was convicted of individually and jointly carrying a firearm unlawfully during the commission of the conspiracy heretofore described.

The Government's proof in chief consisted of two witnesses, Mr. Paris Hoskins and Mr. Truman Hays. The first Government witness, Mr. Paris Hoskins, testified that he did not see anyone attempting to pry off a lock (Appendix, p. 8a), and that he observed three people passing by him as close as twenty feet (Appendix, p. 8a) away, and that he knew the defendant, William Edward "Rube" Alred for some four or five years (Appendix, p. 8a). Further, this witness testified, "The years that I (he) worked for Mr. Haywood . . . I don't know whether it was 1969, 1970, or 1971, whatever year it was, but when I worked for him sometimes I would see Mr. Alred every day . . . (Appendix, p. 8a) and as a matter of fact had coffee in his house as well" (Appendix, p. 9a).

Finally, under cross-examination, this Government witness testified as follows:

> "Q. And you're telling this jury that a man you have known since 1969 walked by approximately twenty (20) feet from where you were in a trailer, and you did not recognize him as Mr. Rube (William) Alred, is this correct?
>
> A. Yes, sir" (Appendix, p. 9a).

On recross-examination he stated there was *nothing* (emphasis supplied) that he could testify to in Court

from the witness stand which would in any way implicate defendant Alred.

The only Government witness put on by the Government in chief to identify the defendant, William Edward Alred, was Mr. Truman Hays. Mr. Hays testified that he did not recognize the defendant, William Edward Alred, on the night of the alleged crime (Appendix, pp. 9a-10a); but, that he identified him about three days later when he picked him out of some mug shots, *supra*. This eyewitness testimony, made some three days after the alleged crime of October 17, 1972, was the only testimony implicating the defendant in any criminal conduct.

The defense in the instant case was predicated on alibi. The first witness to testify for the defense, Logan Middleton, testified he called defendant Alred and asked if he had heard about (co-defendant) Gene Brock getting shot (Appendix, p. 10a).

The next witness, Oscar Haywood, testified to being at defendant Alred's home when he (Alred) received a telephone call that (co-defendant) Gene Brock had been shot (Appendix, p. 10a). Yet, under cross-examination he could not recall the exact date (Appendix, p. 10a) as being October 17th, 18th, or 19th of 1972. However, even under persistent cross-examination, he could not admit any previous news of this shooting in Harlan prior to this phone call (Appendix, p. 11a) and on redirect testified this telephone call was the first time that he had ever heard anywhere about Gene Brock getting shot (Appendix, p. 13a).

Penny Alred, the daughter of defendant Alred, was the next witness to take the stand and testified to getting a telephone call for her father (Appendix, p. 12a). She heard him say "Gene Brock just got shot in Bell County" (Appendix, p. 13a). Again under cross-examination, she did not know whether the phone call came on October 17th, or not (Appendix, p. 13a), but on redirect testified she had never heard before that night of Gene Brock being shot (Appendix, p. 13a).

Geneva Roskie then testified Mr. Alred's daughter answered the telephone in her presence and told her father, "Daddy, the phone call is for you" (Appendix, p. 14a), and then Mr. Alred said "Gene Brock has just been shot." Then again on cross-examination Geneva Roskie could not recall the day of the month, only that, "it was in October of 1972" (Appendix, p. 14a). Likewise, on redirect examination she testified she had never, "heard of Eugene Brock being shot before this particular night when Mr. Alred answered the telephone and related to you and the people who were there that Mr. Brock had just been shot" (Appendix, p. 14a).

The last witness called by the defense, Pauline Alred, wife of the defendant, recalled making a purchase of roofing, etc., from a local lumber company on October 17, 1972, and that they were delivered on the same day (Appendix, p. 15a).

Also, she recalled her husband receiving a telephone call this same night when he said, "Gene Brock just got shot in Bell County" (Appendix, p. 15a). However, again on cross-examination doubt was cast on the specific date when she testified, "I'm pretty sure

it was on that day that they delivered the stuff. I'm sure it was."

The defense then called Government Agent Hassell Caudill in an unsuccessful attempt to inquire why, if they had reasonable grounds to believe that defendant Alred had committed this crime three days after it occurred, why they waited so long before making the arrest?

Finally, the defense called co-defendant, James Eugene Brock, who testified he had plead guilty to the crime on October 17, 1972, of stealing explosives in Bell County. In addition, Mr. Brock testified he had always maintained, since this crime was committed, that defendant Alred was in no way involved (Appendix, pp. 15a-16a).

The Government then called three witnesses *in rebuttal*. The first, Kentucky State Policeman, Robert Combs, testified he investigated a call in Bell County on October 18th (Appendix, p. 16a), contrary to previous date by the Government eyewitness, Truman Hays.

Also, Kentucky State Policeman, Jack Howard (Appendix, p. 16a) and Johnny Creech, testified the crime in the instant case took place on October 18th, 1972, rather than October 17th, 1972.

ARGUMENT

A Purposeful Delay of Approximately Fifteen (15) Months Between Offense and Arrest in the Instant Case Denied and Prejudiced Defendant's Ability to Defend Himself, and Violated the Due Process Clause of the Fifth Amendment.

Until Judge Skelly Wright in *Nickens* v. *United States* (C.A.D.C. 1963), 323 F. 2d 808, cert. den. (1964, 379 U. S. 905), it was assumed that no constitutional protection was available to the defendant who was a victim of delay in initiating charges against him. Judge Wright's opinion, however, explained how this type of delay might prejudice a defendant more severely than in an ordinary speedy trial situation:

> "Indeed, a suspect may be at a special disadvantage when complaint or indictment, or *arrest* is purposely delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags." *Id.* at 813. (Emphasis supplied.)

Two years later this rationale became the basis for the opinion in *Ross* v. *United States* (C.A.D.C. 1965), 349 F. 2d 210, the leading case on preprosecution delay. There the Court dismissed a narcotics indictment where there was (1) a purposeful delay of seven months be-

tween offense and arrest, (2) a plausible claim of inability to recall or reconstruct the events of the day of the offense, and (3) a trial in which the case against appellant consists of the recollection of one witness refreshed by a notebook. (8A Moore's Federal Practice, §48.03(1) 1973.)

Admittedly, there was some ambiguity in *Ross* as to whether the dismissal was predicated on a violation of due process or was in the exercise of the Court's supervisory powers. The Court referred to the violation of rights "akin to Fifth Amendment due process," but at the same time also used language to suggest it was exercising its supervisory powers. *Id.* at 211, 216.

In *United States* v. *Marion,* 404 U. S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468, however, the Supreme Court considered whether the speedy trial right is applicable to pre-prosecution or pre-indictment delay, holding (with three Justices concurring in the result) that the right is inapplicable in such situations. But the Government conceded in the case that the *due process* clause of the Fifth Amendment "would require dismissal of the indictment if it were shown at trial that the pre-indictment delay . . . caused substantial prejudice to (the right) to a fair trial and that the delay was a purposeful device to gain tactical advantage over the accused." *Id.* at 325.

Thus, the Supreme Court made it abundantly clear in *Marion* dicta "That the Due Process of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay caused substantial prejudice to appellee's right to a

fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *Brady* v. *Maryland*, 373 U. S. 83 (1963); *Napue* v. *Illinois*, 360 U. S. 264 (1959). *Id.* at 324.

Perhaps the reasonableness of any delay is best presented in *Marion* in a concurring opinion by Justice Brennan when this broader question is raised:

> "When is Governmental delay reasonable? Clearly, a deliberate attempt by the Government to use delay to harm the accused, or Governmental delay that is 'purposeful or oppressive' is unjustifiable . . . The same may be true of any Governmental delay that is unnecessary. Whether intentional or negligent in origin. A negligent failure by the Government to ensure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials. Thus, the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided—whether it was unnecessary. To determine the necessity for Governmental delay, it would seem important to consider, on the one hand, the intrinsic importance of the reason for delay, and, on the other, the length of the delay and its potential for prejudice to interests protected by the speedy-trial safeguard. For a trivial objective, almost any delay could be reasonably avoided. Similarly, lengthy delay, even in the interests of realizing an important objective, would be suspect." 398 U. S. at 51-52.

In the instant case, fifteen months had elapsed between the time the defendant was "accused" by the only Government witness and the time he was arrested, although the trial took place less than six (6) months after the arrest and indictment on January 24, 1974.

While counsel will admit "in some types of criminal prosecution, of course, delays before complaint will often be unobjectionable, when involved investigations, difficult prosecuting decisions, or complex preparations for the Grand Jury are necessary, the delay may be warranted. When the authorities are unsure against whom to proceed, or doubtful of the adequacy of the case, then, of course, no formal charges should be brought." 323 F. 2d at 813. Cf. *United States* v. *Pancsko* (CA 7th 1966), 367 F. 2d 737, cert. den. (1967) 385 U. S. 1009.

However, the Government made absolutely no showing in the instant case for a delay even though their only witness testified he identified the defendant three (3) days after the alleged crime in 1972 (Appendix, p. 10a). As pointed out in the concurring opinion in *Marion* by Justice Douglas:

> ". . . The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the Government to prove its case. See *Ponze* v. *Fessenden*, 258 U. S. 254, 264 (1922).
>
> "Moreover, while awaiting trial, an accused who is at large may become a fugitive from justice

or commit other criminal acts. And the greater lapse of time between commission of an offense and the conviction of the offender, the less the deterrent value of his conviction." *Dickey* v. *Florida*, 398 U. S. 30, 42 (1970).

Defendant attempted to show alibi for his defense and had he been notified of pending charges against him, he could have taken steps to preserve his memory and those around him on the night in question. Several witnesses testified defendant received a telephone call on the night of the alleged crime and he (defendant) stated Gene Brock had been shot in Bell County (Appendix, pp. 10a, 12a, 13a and 14a). The Government was unable to show the defendant did not get such a call, they only emphasized a lack of ability of Penny Alred, Perry Fowler, Roskie Hoskins, and Oscar Haywood to remember the precise date of the call. Even his wife, Pauline Alred, was not absolutely sure of the exact date, merely that she was "pretty sure it was on the day they delivered the stuff," speaking about certain materials for her home.

Surely, this Court is not so cosmopolitan that it cannot appreciate the swiftness which news of a shooting takes place in a small town. The fact that while none of the witnesses could testify as to the exact date in question all of them testified they had never previously heard of the shooting prior to the telephone call. Would it not have been more reasonable to presume they could have been more specific of such a date had the defendant been arrested as soon as he had been identified three days after the alleged crime? Did not

the Government's willful failure to act or arrest impair the ability of the defendant to defend himself?

The only evidence offered by the Government which in any way implicates the defendant was the eyewitness testimony of Truman Hays, who was alleged to have identified the defendant three (3) days after the alleged crime (Appendix, p. 10a). Counsel submits to the Court that the Government must have had some doubt as to defendant's guilt which they did not disclose or else they would have arrested the defendant immediately. If they had no doubt of defendant's guilt, the only other possible motive for not accusing the defendant was to impair the ability of the accused to defend himself.

As stated in *Ross, Ibid.* at 213:

> ". . . the Constitution contemplates a separate interest in fair procedures for the citizen faced with the loss of his liberty by reason of criminal charges. When interests of this nature impringe upon each other, as they have a way of doing, they must be accommodated. A balance must be struck, if one or the other is not to be sacrificed completely. We see no inevitable necessity for such sacrifice here. . . . The building of framework of procedural fair play, like other constructions, rests to some degree upon probabilities. And the probabilities here are in favor of the shorter period."

The blame for any such delay certainly cannot be allowed to fall on the defendant in the instant case because counsel for the defendant called Hassell Caudill,

Resident Agent in charge of the Pineville, Kentucky post of the Treasury Department in an effort to inquire about such a delay. Not only would the Court not allow counsel to show a lapse of time in the instant case, but the Trial Court denied the defendant the right to impeach the Government's case by pointing out that a law officer has the right to arrest for a felony without a warrant at any time he has reasonable grounds upon which to believe a felony has been committed.

What other reason could the Government have in the instant case for delay in arresting the defendant, unless they doubted his guilt? There was absolutely no showing of any new evidence during the fifteen (15) months against the defendant. If the Government had reason to believe the defendant was guilty three (3) days after the crime, absent the showing of new or additional evidence or excuse, the Government had a duty to make an arrest.

We can only conclude the Government's inaction was prejudicial to the defendant's ability to defend himself and consequently violated the defendant's due process under the Fifth Amendment.

CONCLUSION

With the utmost respect, it is submitted that the long unexplained delay of some fifteen (15) months between the time petitioner was identified and subsequently arrested caused substantial prejudice to petitioner's right to a fair trial. In addition, petitioner was denied his right to show that the delay was a purposeful device to gain a tactical advantage over the

petitioner by making it impossible to recall or reconstruct the events of the day of the offense.

I suggest this is a most serious constitutional issue, in dire need of definitive guidelines as to when actual prejudice takes place so as to afford proper constitutional protection to those victims of undue delay having charges brought against them. This case offers the Court an opportunity to clear up the confusion between pre-indictment delay and due process under the Fifth Amendment. The place and time to provide such guidelines for substantial prejudice is here and now. Counsel hereby asks the Court to do so.

Respectfully submitted,

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APPENDIX

PROCEEDINGS IN THE COURT BELOW

INDICTMENT

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Count 1.

The Grand Jury charges:

That on or about October 16 and October 17, 1972, in Bell County, in the Eastern District of Kentucky, in the Eastern District of Tennessee, and elsewhere to the Grand Jury unknown, James Eugene Brock, Elmon Middleton and William Edward Alred wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with other persons to the Grand Jury unknown to commit the following offense against the United States: to wilfully receive, conceal, transport and dispose of explosive materials, knowing that such explosive materials were stolen, all in violation of Title 18, Section 842(h), United States Code.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants performed the following overt acts:

(1) On or about the 16th day of October, 1972, Elmon Middleton secretly visited the explosives magazine of the Phillips Petroleum Corporation at Wards Chapel in Bell County, Kentucky, for the purpose of determining the quantity, condition, and accessibility of certain explosive material that he intended to assist in stealing

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at some later date.

(2) Elmon Middleton, William Edward Alred, and James Eugene Brock met on October 17, 1972, in Tennessee and drove to a location near the explosives magazine as set out above.

(3) On October 17, 1972, in Bell County, Kentucky, Elmon Middleton, William Edward Alred, and James Eugene Brock jointly possessed a pry bar for the purpose of breaking into the Phillips Petroleum Corporation's explosives magazine and there to steal certain explosive material.

(4) On October 17, 1972, in Bell County, Kentucky, Elmon Middleton, William Edward Alred and James Eugene Brock pried open the locked door of the explosives magazine as before described.

Count 2.

The Grand Jury Further Charges:

That on or about the 17th day of October, 1972, in Bell County, in the Eastern District of Kentucky, James Eugene Brock, Elmon Middleton and William Edward Alred did each, individually and jointly, carry a firearm unlawfully during the commission of the felony crime set out in Count 1 of this indictment for which they may be prosecuted in a court of the United States.

* * * * * * *

JURY VERDICT

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The Court: The Clerk will read the verdict, please.

The Clerk: Yes, Your Honor.

London Number 74-7, United States of America vs. William Edward Alred.

We, the Jury, find as to Count 1, guilty; as to Count 2, guilty.

June 17, 1974.

/s/ Vernon Whitis, Foreman.

* * * * * * *

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 74-1972

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

WILLIAM EDWARD ALRED, - - *Defendant-Appellant.*

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed April 8, 1975.

Before: EDWARDS, PECK and ENGEL, Circuit Judges.

PECK, Circuit Judge. Defendant-appellant was convicted at a jury trial in district court of conspiring to willfully receive, conceal, transport, and dispose of stolen explosive materials, 18 U.S.C. § 842(h) (1970),[1] and of carrying a firearm unlawfully during the commission of a felony, 18 U.S.C. § 924(c) (1970).[2]

[1] "It shall be unlawful for any person to receive, conceal, transport, ship, store, barter, sell, or dispose of any explosive materials knowing or having reasonable cause to believe that such explosive materials were stolen."

[2] "Whoever—

> carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States.

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years . . ."

On the instant appeal, appellant argues that the unexplained delay of fifteen (15) months between the commission of the offenses (October 18, 1972) and the indictment charging him with such offenses (January 29, 1974), deprived him of due process particularly where the only trial witness identifying appellant as being involved in the attempted theft of certain explosives identified appellant three days after the offenses (October 21, 1972) as being involved. At least, appellant argues, the district judge erred in refusing to permit defense counsel to elicit from government agents their authority to arrest without a warrant, appellant's theory being that the failure to arrest him, once he had been identified as being involved, would be relevant as showing a lack of governmental belief in his guilt and, consequently, helpful in arguing to the jury that the government had failed to prove his guilt beyond a reasonable doubt.

Although this court originally held that statutes of limitations exclusively control the permissible length of pre-indictment delay (*see, e.g., Lothridge* v. *United States*, 441 F. 2d 919, 922 (6th Cir.), *cert. denied*, 404 U. S. 1003 (1971), *Hoopengarner* v. *United States*, 270 F. 2d 465, 469 (6th Cir. 1959)), this court in *United States* v. *Giacalone*, 477 F. 2d 1273, 1276-1277 (6th Cir. 1973), recognized that, given a sufficiently unexplained pre-indictment delay and sufficient prejudice stemming from such delay, a pre-indictment delay could violate due process.[3]

Even assuming that appellant's failure to raise the pre-indictment delay on a pre-trial motion or at trial[4] did not

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[3]See, e.g., *United States* v. *Marion*, 404 U. S. 307, 324-326 (1971); *Ross* v. *United States*, 349 F. 2d 210 (D.C. Cir. 1965); *United States* v. *Judice*, 457 F. 2d 414, 417-418 (5th Cir.), *cert. denied*, 409 U. S. 886 (1972); *Wilson* v. *United States*, 409 F. 2d 184 (9th Cir.), *cert. denied*, 395 U. S. 983 (1969).

[4]Though defense counsel at trial attempted to argue that the government's delay in arresting appellant reflected a lack of governmental belief in appellant's guilt, counsel apparently never as-

(Footnote continued on following page.)

waive his claim of delay, *see United States* v. *Russo*, 442 F. 2d 498, 502-503 (2d Cir. 1971), *cert. denied*, 404 U. S. 1023 (1972), *United States* v. *Scully*, 415 F. 2d 680, 682 (2d Cir. 1969), *Chapman* v. *United States*, 376 F. 2d 705 (2d Cir.), *cert. denied*, 389 U. S. 881 (1967), *but see Barker* v. *Wingo*, 407 U. S. 514, 524-532 (1972), we find no deprivation of due process in the 15-month delay because appellant did not show substantial delay-caused prejudice. *Giacalone, supra*, at 1276-1277; *United States* v. *Davis*, 487 F. 2d 112, 116 (5th Cir. 1973), *cert. denied*, 415 U. S. 981 (1974); *United States* v. *Feldman*, 425 F. 2d 688, 691-692 (3rd Cir. 1970); *United States* v. *Baker*, 424 F. 2d 969, 970 (4th Cir. 1970); *United States* v. *Deloney*, 389 F. 2d 324, 325 (7th Cir.), *cert. denied*, 391 U. S. 904 (1968); *United States* v. *Feinberg*, 383 F. 2d 60, 65-67 (2d Cir. 1967), *cert. denied*, 389 U. S. 1044 (1968). See *United States* v. *Strauss*, 452 F. 2d 375, 377-378 (7th Cir. 1971), *cert. denied*, 405 U. S. 989 (1972).

Appellant claims prejudice in that the delay prevented him from preserving "his memory and [that of] those around him on the night in question." The trial transcript, however, reveals that appellant paraded no fewer than six alibi witnesses who testified they were in appellant's residence the night he received a telephone call informing him that one Eugene Brock "had just got shot in Bell County." Appellant argued that, because Brock was shot in the attempted theft of explosives underlying the government's charges, because appellant was in his residence the evening and night the alibi witnesses first learned of the shooting of Brock, and because in the "small rural communities in East-

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(Footnote continued from preceding page.)

serted that due process requires that the indictment be dismissed for prejudicial pre-indictment delay. On oral argument in this court, counsel asserted that he failed to raise the pre-indictment delay earlier because the lack of jurisdiction for the delay was "not readily evident;" only at trial, counsel claimed, he learned that appellant was identified as being involved three days after the commission of the offenses.

ern Kentucky" had Brock been shot on a prior night the alibi witnesses would have had previously heard of the shooting, he could not have been involved in the attempted theft.

Although the government's case-in-chief indicated the offenses occurred on October 17, 1972, the government, in rebuttal, produced state police records indicating that the attempted break-in occurred on October 18, 1972. Unfortunately, the government discovered the error only after the testimony of the six alibi witnesses. Even assuming that the alibi witnesses would have been able to have dated the telephone call as being October 18, 1972, had appellant been more timely indicted, we fail to see substantial prejudice to his alibi defense since the alibi witnesses recalled, in great detail, the telephone call and the events surrounding it. Three of the witnesses, in fact, were unable to recollect whether appellant received the call on October 16, 17, or 18, or even just sometime in October, 1972. Another witness originally was unable to recall the date as being October 17. Even though that witness, and two others, eventually testified, on direct or re-direct examination, that appellant received the call on October 17 such error is immaterial. The crux of their testimony, and all that the jury need believe to establish the alibi, was that appellant—at home all evening and night—received a telephone call, informed the alibi witnesses that Brock had just been shot, and they, at that time, had never heard of the Brock shooting. In essence, the telephone call, rather than the calendar, dated their testimony.

We also reject appellant's claim, without citing authority, that the district judge erred in refusing to permit him to elicit that government agents, although having the authority to arrest on probable cause without a warrant, failed to arrest him prior to the indictment. Purportedly, such failure would reflect the agents' lack of belief in appel-

lant's guilt and would be relevant in the jurors' determination of appellant's guilt. *Hoffa* v. *United States*, 385 U. S. 293, 310 (1966), established that

> "[t]here is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect. . . . Law enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction."

Under such circumstances, and in the absence of authority, *but see, United States* v. *Sanchez*, 361 F. 2d 824 (2d Cir. 1966), we decline to hold that the district judge abused his discretion, *United States* v. *Dollers*, 408 F. 2d 918, 922 (6th Cir.), *cert. denied*, 395 U. S. 943 (1969), *United States* v. *Craft*, 407 F. 2d 1065, 1070 (6th Cir. 1969), in excluding such evidence. *See People* v. *Garcia*, 7 Ill. App. 3d 742, 288 N. E. 2d 637, 641 (1972) (no error in refusing to admit evidence that state previously had nolle prosse burglary charge). *See also Alexander* v. *Commonwealth*, 450 S. W. 2d 808, 810-811 (Ky. 1970).

Affirmed.

TESTIMONY IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, AT LONDON, KENTUCKY

EXCERPTS FROM TESTIMONY OF PARIS HOSKINS

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Q. Did you see anybody pry a lock off?

A. The lock hadn't been pried off the cable, no.

Q. Well, I'm not asking you if it had or hadn't, Mr. Hoskins. I'm just asking you did you see anyone of these three alleged people attempt to pry off a lock?

A. No, sir.

* * * * * * *

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Q. Twenty (20') feet, about as close at the two of us?

A. Uh huh.

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Q. All right, Mr. Hoskins, do you know the defendant, Rube Alred? I think you have testified that you do.

A. I do.

Q. How long have you known him?

A. I'd say, four or five (4-5) years.

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Q. How often would you be in there and how often would you see Mr. Alred in 1969 and 1970?

A. Well, the years that I worked for Mr. Haywood—let's put it that way—I don't know whether it was 1969, '70, or '71, whatever year it was, but when I worked for him sometimes I would see Mr. Alred every day. Every time I would come in he was there.

Q. How many people did Mr. Haywood have working for him at that time?

A. He had several people.

Q. Ten or fifteen?

A. I'd say, I don't know.

Q. How many did you come in contact with? That's what I'm trying to obtain, Mr. Hoskins.

A. I come in contact with most of them that worked there, but a lot of them I didn't know, because it was a pretty good size operation.

Q. You had enough frequent association with Mr. Alred that you would know him if you met him on the street, did you not?

A. Yes, sir.

Q. As a matter of fact, you have had coffee in

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his house, haven't you?

A. I have been in his house, yes, sir.

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Q. And you're telling this jury that a man you have known since 1969 walked by approximately twenty (20') feet where you were in a trailer, and you did not recognize him as Mr. Rube Alred, is this correct?

108

A. Yes, sir.

EXCERPTS FROM TESTIMONY OF TRUMAN HAYS

161

Q. Do you mean to tell the jury that you didn't know who it was that night, you just recognize him now as being that man that night?

A. Yes, sir, that's correct.

Q. Okay. Now, when was it you first found out this fellow's name?

A. About three (3) days later when I picked him out of some mug shots.

Q. This was three days later?

A. Approximately.

Q. What year would that be in?

A. Three days later, it was right after the 18th of October.

Q. Was it the 18th of October now, or the 17th? The 17th, wasn't it?

A. The 17th.

EXCERPTS FROM TESTIMONY OF
LOGAN MIDDLETON

203

Q. Would you tell the Court and Jury, please, whether or not you can recall anything out of the ordinary happening to Mr. Brock on or about October 17th, 1972?

A. I recall hearing of him being shot.

The Court: Sustained.

Do you know of your own knowledge what happened to him?

A. No, sir, I don't.

EXCERPTS FROM TESTIMONY OF
OSCAR HAYWOOD

217

Q. Do you know the defendant, Mr. Alred?

A. Yes, sir.

Q. Do you know Eugene Brock?

A. I know him a little bit.

Q. Do you recall October 17th, 1972, if you do remember this date, will you tell us if you remember being at the home of Mr. Alred?

A. Yes, sir, I do.

Q. Tell this Jury here what time you got to Mr. Alred's home?

A. It was approximately 10:00 o'clock, or maybe

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11:00. Somewhere around there.

I've got a garage that Mr. Alred lives behind my garage and I park my trucks around there. We have ten or twelve trucks, and we use that for a parking lot back there. Every night before I go to bed I walk around behind this garage. Sometimes there's fellows goes around there and drinks beer. It's back where not too many people live, and I walk around there to see if anybody is parked around there, and sometimes I have to tell them to leave. Sometimes they get in the trucks and bother the drivers' personal property.

And I walked around there this night, and every once in a while I will walk into Rube's house. He lives one house from the parking lot. And I walked in this house that night and Rube and I, and another fellow by the name of Bill—I don't know his name, but we were sitting at Rube's kitchen table when his little girl answered the telephone, and she told him somebody wanted him on the telephone, and when Rube came back he said that Gene Brock had been shot; said he got both of his legs shot off.

And that's just about it.

Q. Who all was there?

A. Rube's brother-in-law was there, Perry Fowler.

Q. Where were you when this telephone call came

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for Mr. Alred here?

A. We were sitting in Rube's kitchen at the table.

Mr. Roberts: That's all.

The Court: Cross-examine.

Cross-examination

By Mr. Kirkland:

Q. Mr. Haywood, you don't know that this occurred on

October 17th? It could have been on the 18th or the 19th, couldn't it?

A. All I know he came back in there and he said Gene Brock had just got shot. The exact date, I wouldn't be sure, but he said Gene Brock had just got both legs shot off.

Q. So if you were there when this telephone call came in, so far as you know the telephone call could have been the day after he got shot, or two days?

A. That's right.

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Re-Direct Examination

By Mr. Roberts:

Q. This evening that you were there, Mr. Haywood, is that the first time that you had ever heard about Gene Brock getting shot anywhere?

A. That's right.

EXCERPTS FROM TESTIMONY OF PENNY ALRED

222

Q. Now, do you recall on or about October 17th, 1972 receiving a telephone call at your house? Do you live with your father?

A. Yes, I do.

Q. Do you recall getting a telephone call there at the house?

A. Yes.

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Q. What, if anything, did he say after he had answered the telephone?

A. Well, I heard him say: "Well, I'll be damned."

And then when he hung up, Mom asked him what happened —Mom asked him "What's wrong"? And he said Gene Brock just

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got shot in Bell County, and that's all I heard him say.

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Q. Could this have been in December instead of at some other time?

A. I really don't know when it could have been. I know I was at home the night I received the phone call.

Q. And you know you had been to school that day?

A. Yes.

Q. Could it have been just before Christmas?

A. It could have been. I'm not for sure.

Q. So, you don't know whether the phone call came on October 17th or not, do you?

A. No, all I know I was there when the phone call came.

Q. All right. It could have been October 18th, is that right?

A. It could have been.

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Q. Had you ever heard of Gene Brock ever being shot before your father told you that night?

A. No, sir.

EXCERPTS FROM TESTIMONY OF GENEVA ROSKIE

234

Q. Then what did you do?

A. I brought him back to Mr. Alred's house and went in and had a cup of coffee with them, and I was sitting there

talking to Miss Alred when the phone rung, and the daughter answered the phone, and Mr. Alred was eating supper, him and Mr. Fowler, and the daughter said: "Daddy, the phone call is for you."

Q. Go ahead.

A. And when Mr. Alred took the phone, he said Gene Brock had just been shot.

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Q. All right. Do you recall what day of the month it was on?

A. No, I don't. It was in October of 1972, but I don't remember the date.

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Re-Direct Examination

By Mr. Roberts:

Q. Mrs. Roskie, had you ever heard of Eugene Brock being shot before this particular night when Mr. Alred answered the telephone and related to you and the people who were there that Mr. Brock had just been shot?

A. No, sir, I hadn't.

EXCERPTS FROM TESTIMONY OF PAULINE ALRED

301

Q. Now, do you recall the evening of October 17th, 1972?

A. Yes, sir, I do.

Q. All right. Now, before you go into what happened that evening, I want you to tell how you are able to remember whether or not we're talking about October 17th? How do you know it was October 17th?

A. Well, on a Monday, that was the 16th, they come a rain, and I had a leak that come in my living room. So, my husband told me to go to Pope and Cawood, that's in Harlan, and get a roll of roofing, and I needed a roll of insulation, and I needed a piece of paneling where we were remodeling the house, and I went and got it and I have this here.

(Reporter's note: Witness holds up a piece of paper).

Q. What day did you go to the lumber company?

A. On October 17th, 1972, on a Tuesday.

Q. Did you make a purchase of these things?

A. Yes, sir, I paid for them and they delivered

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them.

Q. And on what day did they deliver them?

A. On the same day.

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Q. What you heard Rube say.

A. He said: "Well, I'll be damned." So when he talked a few more minutes and he hung up, I asked him, I said: "Rube, what was wrong?" By him saying that, I asked him what was wrong, and he said Gene Brock just got shot in Bell County. He went on to the kitchen and he told Oscar and my brother that Gene Brock had just got shot in Bell County, and my brother asked who was Gene Brock, and I said: "Perry, it's the one that used to date our oldest sister."

EXCERPTS FROM TESTIMONY OF GENE BROCK, CO-DEFENDANT

339

Q. Mr. Brock, I want you to tell this Court and this Jury whether or not you have always maintained, since the

night in question that this crime was committed, that Mr. Alred was in no way involved?

A. Mr. Alred—I hadn't even seen Mr. Alred. I had been run out of Kentucky, and that was the first time I had been back in Kentucky. I had been out in Ohio and come back down in Tennessee, and I hadn't even seen Mr. Alred until we was down here in court.

EXCERPTS FROM TESTIMONY OF ROBERT COMBS

349

Q. Oh, by the way, what day was this on?

A. I'm not certain of the day, but it was the 18th of October. I think it was a Wednesday, I'm not sure.

Q. So, if the shooting took place at about 10:15 P.M. on October 18th, would there be any way the people in Harlan could know about it at 9:30 on the 17th?

EXCERPTS FROM TESTIMONY OF JACK HOWARD AND JOHNNY CREECH, KENTUCKY STATE POLICE

365

Q. Did you receive a call around 10:00 o'clock or a little after on October 18, 1972 with regard to a potential break-in in Bell County?

A. Yes, sir.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1406

WILLIAM EDWARD ALRED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was prejudiced by a fifteen-month delay in returning the indictment and that the district court erred in refusing to permit him to ask government agents the reasons for their failure to arrest him prior to the return of the indictment.

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on one count of conspiracy willfully to receive, conceal, transport, and dispose of stolen explosive materials, in violation of 18 U.S.C. 842(h) (Count 1), and one count of carrying a firearm unlawfully during the commission of a felony, in violation of 18 U.S.C. 924(c) (Count 2).[1] Petitioner was sentenced to three years'

[1]Petitioner's co-defendant, James Eugene Brock, pleaded guilty to both counts of the indictment and co-defendant Elmon Middleton pleaded guilty to one count of storing explosive materias, in violation of 18 U.S.C. 842(j). See Tr. 23-34, 42-50, 486.

imprisonment on Count 1 and ten years' imprisonment on Count 2. Execution of the sentence on Count 2 was suspended and a five-year period of probation, to commence upon petitioner's release from federal custody, was imposed (Tr. 487-488). The court of appeals affirmed (Pet. App. 3a-7a).

The evidence established that on the morning of October 18, 1972, Truman Hayes, Regional Manager of the Blasting Materials Division of Phillips Petroleum Corporation, discovered that locks on powder magazines in Kentucky, had been tampered with (Tr. 116). Believing that the perpetrators would return that evening, Hayes and a watchman secreted themselves in a trailer near the magazines. At approximately 10 p.m., they saw three men approach the area, which was illuminated by a mercury vapor lamp.

The Kentucky State Police were summoned, and the watchman left to direct them. Meanwhile, after moving to a position behind a truck for better visibility, Hayes called for the three to surrender as they passed into a lighted area in front of him and about six to eight feet away. Gunfire was exchanged; James Eugene Brock was wounded and captured, but the other two men escaped (Tr. 119-135).

At trial, Hayes positively identified petitioner as one of the three individuals he saw at the powder magazines (Tr. 123-124, 176). Although he had once been an acquaintance of petitioner, the watchman was unable to identify any of the men he saw that night. He did testify, however, that one of the men was similar in size to petitioner (Tr. 76, 88-89).

1. Petitioner contends that the fifteen-month delay between the commission of the offenses on October 18, 1972, and the return of the indictment on January 29, 1974, prejudiced his ability to defend himself and violated the Due Process Clause of the Fifth Amendment.[2] Even if this claim is now available to petitioner in light of his failure to raise it by motion before trial or at trial, it is without merit.

The Due Process Clause of the Fifth Amendment comes into play in pre-indictment delay cases and requires dismissal of the indictment only "if it [is] shown * * * that the pre-indictment delay in [the] case caused substantial prejudice to [the accused's] rights to a fair trial *and* that the delay was an intentional device to gain tactical advantage over the accused." *United States* v. *Marion, supra,* 404 U.S. at 324 (emphasis supplied). See also *United States* v. *Giacalone,* 477 F.2d 1273, 1276-1277 (C.A. 6). Thus "[w]hile the Speedy Trial Clause addresses damage to the defense and other apprehensions as well, the concern of the Due Process Clause is erosion of the accused's capability to muster his response to the charges" (*United States* v. *Parish,* 468 F.2d 1129, 1133 (C.A.D.C.)), and its invocation "clearly requires a showing of actual prejudice." *United States* v. *McClure,* 473 F.2d 81, 82 (C.A.D.C.).

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[2]Petitioner does not base his claim on the Sixth Amendment's speedy trial guarantee. His reliance on the *Ross* line of cases *(Ross* v. *United States,* 349 F.2d 210 (C.A.D.C.)) (Pet. 7-8, 12-13), is misplaced; for that "unique line of cases" in the District of Columbia Circuit is based on the court of appeals' "purported supervisory jurisdiction" and not on the Constitution. *United States* v. *Marion,* 404 U.S. 307, 317, n. 8.

Here, petitioner has failed to show actual prejudice to his defense or to his rights to a fair trial, and he has not pointed to any specific way in which the lapse of time between offense and indictment precluded him from "muster[ing] his response to the charges" against him. Indeed, petitioner's assertion that the delay prevented him from preserving "his memory and [that of] those around him on the night in question" (Pet. 11) rings hollow in the light of the trial transcript which, as the court of appeals noted (Pet. App. 5a), "reveals that [petitioner] paraded no fewer than six alibi witnesses" who testified that they were with petitioner in his residence on the night of the crime.[3] Petitioner was convicted because the jury did not believe his alibi witnesses, not because of prejudice resulting from pre-indictment delay.

Nor has petitioner demonstrated any intentional delay or bad faith on the part of the government in order to gain a tactical advantage—the second essential requisite to relief under the Due Process Clause. See *United States* v. *Marion, supra,* 404 U.S. at 324; *United States* v. *Brown,* 511 F.2d 920, 922-923 (C.A. 2).

2. Petitioner also claims that the district court erred in refusing to permit him to bring out on cross-examination that government agents, who had the authority to arrest on probable cause without a warrant, failed to arrest him until fifteen months after he was identified. Purportedly, this would show the agents' lack of belief in petitioner's guilt and be relevant in the jurors' assessment of his guilt (Pet. 13).

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[3]Perhaps it is because of these alibi witnesses that petitioner failed to file a pre-trial motion to dismiss and discovered that he was "prejudiced" by the delay only when the jury rejected the testimony of his alibi witnesses and found him guilty.

A trial judge has broad discretion, however, in limiting cross-examination, and the court of appeals (Pet. App. 6a-7a) properly ruled that the district judge had not here abused his discretion in excluding such testimony. Even assuming that the agents' delay in arresting petitioner reflected a belief that he was innocent—a dubious assumption at best—that belief would hardly have been of critical significance for the jury in determining petitioner's guilt.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.